

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2014AP1766
2014AP2896
STATE OF WISCONSIN**

Cir. Ct. No. 2011CV1019

**IN COURT OF APPEALS
DISTRICT IV**

No. 2014AP1766

DuWayne J. Hoffman and Judith A. Hoffman,

Plaintiffs-Appellants-Cross-Respondents,

v.

Scenic Ridge Verona, LLC,

Defendant-Respondent-Cross-Appellant,

Park Bank, Michael J. Bauhs, David R. Dohnal, Jill Erickson Dohnal, US Bank, University of Wisconsin Credit Union, Premier Builders, Inc., Wisconsin Power and Light Co., Midwest Homes, Inc., Dean A. Gorrell, Amy J. McNeal, James L. Bosch, Joanne M. Bosch, Heath J. Miller, Patti M. Miller, Anchor Bank, State Farm Mutual Automobile Ins. Co., Brett A. Rehm, Krista R. Rehm, Johnson Bank, Jesse J. Vogel, Erin E. Vogel, First Business Bank and City of Verona,

Defendants.

No. 2014AP2896

DuWayne J. Hoffman and Judith A. Hoffman,

Plaintiffs-Appellants,

v.

**Scenic Ridge Verona, LLC, Wisconsin Power & Light
Company and City of Verona,**

Defendants,

**Park Bank, Michael J. Bauhs, David R. Dohnal, Jill
Erickson Dohnal, U. S. Bank, University of Wisconsin
Credit Union, Premier Builders, Inc., Midwest Homes,
Inc., Dean A. Gorrell, Amy J. McNeal, James L. Bosch,
Joanne M. Bosch, Heath J. Miller, Patti M. Miller,
Anchor Bank, State Farm Mutual Automobile
Insurance Company, Brett A. Rehm, Krista R. Rehm,
Jesse J. Vogel, Erin E. Vogel, Summit Credit Union and
First Business Bank,**

Defendants-Respondents.

APPEALS and CROSS-APPEAL from judgments of the circuit
court for Dane County: C. William Foust, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. DuWayne and Judith Hoffman brought an adverse
possession action against developer Scenic Ridge Verona, LLC in hopes of

obtaining title to a .589 acre parcel of land (“the disputed parcel”).¹ The disputed parcel was on the Hoffmans’ side of a fence (“the historic fence”) that the Hoffmans believed divided their property from adjoining property when the Hoffmans bought their property in 1984. Scenic Ridge acquired the adjoining property in 2004 and removed the historic fence in 2010. According to surveys conducted in 2004 and 2006, the disputed parcel was part of Scenic Ridge’s property.

¶2 The circuit court found that the Hoffmans became owners of the disputed parcel by adverse possession, ordered a forced sale of the disputed parcel to Scenic Ridge for \$35,400, and dismissed the Hoffmans’ claims against all other persons and entities. The following issues are presented on appeal: (1) whether the Hoffmans’ adverse possession claim is barred by laches, equitable estoppel, or promissory estoppel; (2) whether the circuit court erroneously exercised its discretion by ordering a forced sale of the disputed parcel from the Hoffmans to Scenic Ridge; and (3) whether the court’s valuation of the disputed parcel was an erroneous exercise of its discretion. We affirm the court in all respects.

¹ For ease of discussion, we refer to the respondents in these consolidated appeals collectively as Scenic Ridge. On February 16, 2017, we consolidated *Hoffman v. Scenic Ridge Verona LLC*, No. 2014AP1766, and *Hoffman v. Scenic Ridge Verona LLC*, No. 2014AP2896. As to the Hoffmans’ appeals in both cases, the respondents differ, but the facts and arguments of the parties are the same, and thus, we discuss them together. Only Scenic Ridge cross-appeals.

The Hoffmans also brought inverse condemnation claims against Wisconsin Power & Light, which completed utility work on the disputed parcel, and the City of Verona, which built roads and sidewalks on the disputed parcel. The Hoffmans appeal the circuit court’s dismissal of those claims in *Hoffman v. Scenic Ridge Verona LLC*, No. 2014AP2531, and *Hoffman v. Scenic Ridge Verona LLC*, No. 2014AP2635, respectively. Our opinion on the Hoffmans’ inverse condemnation claims is released simultaneously with this opinion.

BACKGROUND

¶3 In 1984, the Hoffmans bought their 79-acre farm. There was a fence, the historic fence, which the Hoffmans believed delineated the property line between their farm to the west and land owned by Randall Acker to the east.

¶4 In 2004, Scenic Ridge began negotiating with Acker to purchase his property to develop it into a residential subdivision. A survey conducted at that time indicated that the historic fence was partially on Acker's property, meaning, according to the survey, that a .589 acre parcel on the Hoffman side of the historic fence was land titled to Acker. Acker proposed to the Hoffmans an exchange of quit claim deeds to resolve the issue, but the Hoffmans declined the offer.

¶5 Although the property dispute remained unresolved, Scenic Ridge purchased Acker's property. From 2004 until 2010, Scenic Ridge developed the property by taking actions including landscaping, apportioning the property into lots, annexing the property to the City of Verona, installing utilities, and adding roads and sidewalks.

¶6 In September 2010, the Hoffmans' attorney sent a letter to an engineering company that worked for Scenic Ridge. The letter proposed an agreement related to the disputed parcel with the following terms:

- Scenic Ridge would remove the historic fence and build a new one at Scenic Ridge's expense on the survey line,
- The replacement fence would be six feet tall,
- The parties would exchange quit claim deeds assigning property rights to the Hoffmans on the west side of the new fence and Scenic Ridge on the east side of the new fence,

- Scenic Ridge would provide twenty-four hours notice before removing the existing fence,
- Scenic Ridge would add a covenant regarding the Hoffman farm to homeowner deeds in its subdivision, and
- Scenic Ridge would grant certain easements to the Hoffmans.

¶7 On October 4, 2010, an engineer working with Scenic Ridge called DuWayne Hoffman to provide twenty-four hours' notice that the existing fence would be removed the next day based on the engineer's "understanding that an agreement was close at hand concerning the historic fence issue." DuWayne responded "that there was no such agreement close at hand and that he strenuously objected to the removal of the fence." The next day DuWayne told a Scenic Ridge representative that "if Scenic Ridge started removing the historic fence ... he would commence litigation against Scenic Ridge."

¶8 On October 6, 2010, Scenic Ridge removed the historic fence and constructed a four-foot tall fence along the survey line. Soon thereafter, utilities were installed on the property, including the disputed parcel. On March 1, 2011, five months after Scenic Ridge removed the historic fence, the Hoffmans filed this action. In the meantime, Scenic Ridge had completed roadwork and sold 13 lots, and house construction had commenced on many of these lots.

¶9 The circuit court bifurcated the Hoffmans' claims, in order to first determine whether the Hoffmans acquired the disputed parcel by adverse possession before resolving the other issues. On cross-motions for summary judgment, the court found that the Hoffmans acquired title to the disputed parcel by adverse possession and that the appropriate remedy was a forced sale of the disputed parcel from the Hoffmans to Scenic Ridge. After rejecting the

Hoffmans' motion for reconsideration, the court held an evidentiary hearing on the issue of valuation. The court issued a written decision that the value of the parcel at its best and highest use was \$35,400. The court also dismissed the Hoffmans' claims against all parties other than Scenic Ridge. The Hoffmans appeal and Scenic Ridge cross-appeals.

DISCUSSION

¶10 It is undisputed that the Hoffmans showed that the disputed parcel was obtained by the Hoffmans by adverse possession. The Hoffmans, however, complain that the circuit court improperly ordered a forced sale of the disputed parcel, and they complain about the court's valuation of that parcel. We address and reject those challenges below but first address Scenic Ridge's cross-appeal.

A. *The Cross-Appeal: Scenic Ridge's Affirmative Defenses to Adverse Possession were Appropriately Dismissed*

¶11 Although Scenic Ridge does not challenge the circuit court's decision on the merits of the adverse possession issue, Scenic Ridge argues that the court should not have entertained the Hoffmans' adverse possession claim in the first instance. Scenic Ridge argues that the claim is barred by one or more of the following three affirmative defenses: laches, equitable estoppel, and promissory estoppel. The circuit court rejected Scenic Ridge's affirmative defenses. To establish that the circuit court erred, Scenic Ridge must show that the court could not reasonably find that at least one element of each affirmative defense asserted was absent. Scenic Ridge fails to do this.

¶12 Scenic Ridge's first affirmative defense is equitable estoppel. "The elements of equitable estoppel are: (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon

by the other, either in action or non-action, and (4) which is to his or her detriment.” *Milas v. Labor Ass’n of Wisconsin, Inc.*, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997). For the following reasons, we agree with the circuit court’s implicit determination that Scenic Ridge did not reasonably rely on the Hoffmans’ relatively short delay in filing suit.

¶13 It is undisputed that DuWayne Hoffman threatened to sue if the fence was removed. Scenic Ridge does not point to any evidence that Scenic Ridge took steps to inquire into whether the Hoffmans had a change of heart about filing suit.

¶14 To the extent that Scenic Ridge contends that it reasonably relied on the proposed terms set out in the September 2010 letter from the Hoffmans’ attorney, Scenic Ridge does not point to evidence demonstrating that the letter was anything more than a proposal. Moreover, Scenic Ridge does not point to evidence showing that it complied with the obligations that the proposal would have placed on Scenic Ridge. Indeed, the circuit court found that Scenic Ridge did not respond to DuWayne Hoffman’s threat of litigation but simply proceeded with its development plans.

¶15 In sum, although the Hoffmans might have filed suit sooner, we perceive no reason why it was reasonable for Scenic Ridge to believe that the Hoffmans would drop the matter.

¶16 Scenic Ridge’s second affirmative defense is laches. The elements of laches are “(1) unreasonable delay by the party seeking relief, (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming, and (3) prejudice to the party asserting laches caused by the delay.” *Zizzo v. Lakeside Steel & Mfg. Co.*, 2008 WI App 69, ¶7, 312 Wis. 2d 463, 752

N.W.2d 889. We focus our attention here only on the second element—whether Scenic Ridge lacked knowledge² of the Hoffmans’ threat to file suit if Scenic Ridge removed the historic fence.

¶17 Scenic Ridge cannot claim that it was unaware that the Hoffmans planned to file a claim against Scenic Ridge. DuWayne Hoffman plainly threatened to do so. Scenic Ridge seems to posit that it justifiably believed DuWayne’s threat was not serious. This argument misses the mark. The circuit court clearly found that the threat of litigation was bona fide and Scenic Ridge does not challenge that finding.

¶18 Scenic Ridge’s third and final affirmative defense is promissory estoppel. The elements of promissory estoppel are (1) a promise reasonably expected to induce action or forbearance, (2) action or forbearance by the promisee, and (3) that injustice can only be avoided by enforcing the promise. *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965). Scenic Ridge apparently claims that the September 2010 letter from the Hoffmans’ attorney, in addition to other unspecified actions by the Hoffmans, satisfies the first element of promissory estoppel. As our discussion so far should make clear, this argument is meritless because the letter merely contained an offer, not a promise. Because Scenic Ridge’s argument fails on the first element of promissory estoppel, we need not address the remainder of Scenic Ridge’s sub-arguments on this topic.

² We need not determine whether Scenic Ridge acquiesced because we conclude that the “knowledge of” element of the laches test is satisfied.

B. The Appeal: The Hoffmans' Challenges to the Forced Sale and the Sale Price

¶19 With respect to the forced sale and the sale price, the circuit court employed its equitable powers. *See* WIS. STAT. § 844.20(1) (2015-16).³ Courts are authorized to create an equitable remedy to resolve a property dispute. *Soma v. Zurawski*, 2009 WI App 124, ¶9, 321 Wis.2d 91, 772 N.W.2d 724; § 844.20(1). We perceive no dispute that the court had such equitable powers here. Rather, the Hoffmans contend that the court misused its discretion in exercising its equitable authority.

¶20 On appeal, equitable decisions are reviewed for an erroneous exercise of discretion. *Richards v. Land Star Group, Inc.*, 224 Wis. 2d 829, 847, 593 N.W.2d 103 (Ct. App. 1999). This exercise of discretion requires “a weighing of the factors or equities.” *Id.* The circuit court’s findings of fact will be sustained so long as they are not clearly erroneous. *Id.* at 848. The court’s decision will be sustained if the court “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Id.* (quoting another source).

³ WISCONSIN STAT. § 844.20(1) reads as follows: “The judgment shall award the relief, legal or equitable, to which the plaintiff is entitled specifically, and without limitation, interference, encroachment, physical injury or waste may be enjoined; damages may be awarded separately, or in addition.”

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

1. Ordering a Forced Sale was a Reasonable Exercise of Discretion

¶21 The circuit court found that the appropriate remedy for the Hoffmans' adverse possession claim was a forced sale of the disputed parcel from Hoffman to Scenic Ridge. Equitable authority to resolve a property dispute includes the power to impose a forced sale. *Soma*, 321 Wis. 2d 91, ¶¶9, 20; *see also* WIS. STAT. § 844.20(1).

¶22 The Hoffmans admit that *Soma* establishes the circuit court's equitable power to order a forced sale. But the Hoffmans then argue that a court's authority to order a forced sale does not extend to forcing a sale from a successful adverse possession claimant to a record title holder. Rather than a forced sale, the Hoffmans assert that the court's order here was "in reality ... a money judgment."

¶23 More specifically, the Hoffmans argue that the circuit court's authority to order a forced sale, which is recognized in *Soma* and an earlier case, *Perpignani v. Vonasek*,⁴ is limited to the situations at issue in those cases where there were forced sales from the title holder to the adverse possessor. However, neither *Soma* nor *Perpignani* suggest that forced sales can only be ordered from a title holder to an adverse possessor. The Hoffmans neither provide a legal argument supporting this purported limitation on the court's equitable powers nor attempt to explain why such a limitation would make sense.

¶24 The Hoffmans also argue that "the [circuit] court acted inconsistently" by making an equitable ruling in favor of Scenic Ridge.

⁴ *Perpignani v. Vonasek*, 139 Wis. 2d 695, 408 N.W.2d 1 (1987). The parties discuss *Perpignani* in their briefs, but we do not rely on it.

According to the Hoffmans, the forced sale order was inconsistent because the court found “that Scenic Ridge did not come to Court with clean hands,” yet the order benefited Scenic Ridge.

¶25 The Hoffmans’ clean hands argument fails for two reasons. First, the circuit court’s finding that Scenic Ridge did not have clean hands was related to the court’s dismissal of Scenic Ridge’s affirmative defenses. That finding does not undercut the reasonableness of the forced sale. Second, the court’s remedy was predicated on avoiding hardship to home owners in the Scenic Ridge subdivision. Any benefit to Scenic Ridge was secondary. Moreover, Scenic Ridge, as we shall see in the next section of this opinion, paid \$35,400 for the disputed parcel, which the circuit court found was the value at the parcel’s highest and best use. We fail to understand why paying this amount for the property unduly benefits Scenic Ridge.

2. The Forced Sale Price was Reasonable

¶26 The Hoffmans make two arguments that the circuit court erroneously exercised its discretion by finding that the best and highest value of the disputed parcel was \$35,400. We reject both.

¶27 First, the Hoffmans argue that the circuit court wrongly denied the Hoffmans’ demand for a jury trial on the valuation issue. We see no merit to the argument, and the Hoffmans do not support it with any legal analysis. Accordingly, we consider it no further. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (the court of appeals may decline to address inadequately developed arguments).

¶28 Second, the Hoffmans argue that, based on *Soma*, they are “entitled to the highest value attained by the disputed parcel between the date of encroachment and the time of trial ... including all of the so-called substantial improvements.” The Hoffmans’ reliance on *Soma* is misplaced.

¶29 In *Soma*, we ruled that the circuit court applied the law of damages codified at WIS. STAT. § 843.13 when the court should have instead applied WIS. STAT. § 844.20. *Soma*, 321 Wis. 2d 91, ¶23. The latter statute, as is amply clear by now, allows courts to resolve property disputes in equity. Although we concluded that the court had wrongly applied § 843.13, we affirmed. *Id.* Pertinent here, we explained that there was no reason to think that the court would have valued the land differently had it used the correct standard. *See id.*, ¶¶20, 23.

¶30 The Hoffmans quote a portion of *Soma* in which we discussed the calculation of damages under WIS. STAT. § 843.13(3). We explained that § 843.13(3) directs that, under specified circumstances, a forced land sale must be at the “highest” value of the land between the time of a party’s “encroachment or taking of possession and the time of trial.” *Id.* at ¶23 (quoting § 843.13(3)). The Hoffmans seemingly assert that our discussion of § 843.13(3) in *Soma* establishes a damages rule that applies to cases decided under WIS. STAT. § 844.20, with the effect being that Scenic Ridge must pay for added value attributable to improvements made by Scenic Ridge after Scenic Ridge encroached on Hoffmans’ property. However, nothing in *Soma* suggests that the “highest” value rule in § 843.13(3) must be applied when a court exercises its general equitable authority under § 844.20. More to the point, nothing in *Soma* supports the proposition that, in a forced sale, the buyer of real property, under any circumstances, *must* pay for the value added to the real property *by that buyer*.

¶31 Here, the circuit court explained that the Hoffmans' appraiser's valuation was excessive because it included value added by Scenic Ridge's development work. Then, based on the valuation provided by Scenic Ridge's expert, the court found that the highest and best use of the disputed parcel was for residential development. In making this finding, the court considered the expert opinions, what Scenic Ridge paid for its property in 2004, and the proximity of the property to a large local employer. These findings and our review of the record persuade us that the court's \$35,400 valuation was a reasonable exercise of discretion.

CONCLUSION

¶32 For the reasons stated above, we affirm the circuit court's rulings that Scenic Ridge failed to establish an affirmative defense to the Hoffmans' adverse possession claim and that a forced sale of the disputed parcel to Scenic Ridge for \$35,400 was a reasonable exercise of discretion.

By the Court.—Judgments affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

